

STATE OF MICHIGAN
ATTORNEY DISCIPLINE BOARD

GRIEVANCE ADMINISTRATOR,
Attorney Grievance Commission

Petitioner,

Case No. 09-47-GA

v.

MICHAEL L. STEFANI, P 20938

Respondent.

FILED
ATTORNEY DISCIPLINE BOARD
10 JUN 23 PM 12:39

DISCIPLINE REPORT OF TRI-COUNTY HEARING PANEL NO. 26.

PANEL MEMBERS:

ANNE WIDLAK, Chairperson
JAMES E. BAIERS, Member
BARRY GOLDMAN, Member

APPEARANCES:

ATTORNEY GRIEVANCE COMMISSION
BY: Robert E. Edick
211 West Fort Street, Suite 1410
Detroit, MI 48226-3236

Appearing on behalf of Petitioner.

MOGILL, POSNER & COHEN
BY: Kenneth M. Mogill
27 East Flint Street, 2nd Floor
Lake Orion, MI 48362

Appearing on behalf of Respondent.

I. EXHIBITS

None offered.

II. WITNESSES

Krystal A. Crittendon.

III. FINDINGS AND CONCLUSIONS REGARDING DISCIPLINE

A. INTRODUCTION.

In our Misconduct Report of March 2, 2010, this panel found that Michael Stefani committed professional misconduct when he knowingly disobeyed obligations under the rules of a tribunal in violation of MRPC 3.4 (c). “*Fairness to Opposing Party and Counsel, MRPC 3.4.*” The evidence established - indeed, Mr. Stefani admitted - that he both violated an order of the trial judge by having the Skytel text messages sent directly to his own office rather than to the judge, and ignored a court rule by failing to serve a copy of a subpoena for the text messages on opposing counsel. (Tr. 75-76, 10/8/09). On April 1, 2010, the panel heard evidence and oral argument regarding an appropriate sanction for that misconduct. The panel’s analysis and findings appear below.

B. GOVERNING LEGAL STANDARDS.

Panels of the Michigan Attorney Discipline Board (ADB) have been directed by the Michigan Supreme Court to determine an appropriate sanction for professional misconduct by following the analytical framework set forth in the American Bar Association’s (ABA) Standards For Imposing Lawyer Sanctions. In *Grievance Administrator v Lopatin*, 462 Mich 235, 244 (2000), the Supreme Court explained that the basic goal of the attorney disciplinary system is to protect the public, the courts, and the legal profession (citing MCR 9.105). To that end, the

Court directed ADB panels to conduct a three step analysis in determining an appropriate sanction for attorney misconduct.

The panel makes its initial inquiry by answering three questions: 1) what ethical duty did the attorney violate - was it a duty to a client, the public, the legal system, or the profession?; 2) what was the lawyer's mental state - did the lawyer act intentionally, knowingly, or negligently?; and 3) what was the extent of the actual or potential injury caused by the lawyer's misconduct - was there a serious or potentially serious injury? *Id* at 239.

Second, the panel must select a sanction that corresponds to the type of misconduct committed by the attorney from the ABA's Recommended Sanctions for a variety of types of misconduct.

Finally, after identifying the ABA's Recommended Sanction for the particular misconduct, the panel must consider evidence of relevant aggravating and mitigating factors that may influence the appropriateness of a sanction under all the circumstances. After reviewing these factors, the panel decides whether to increase or decrease the recommended sanction. *Id* at 240, citing ABA Standard 9.1.

C. LEGAL ANALYSIS

1. Duty Violated, Mental State and Actual or Potential Injury.

This panel already determined during the misconduct phase of this action that Mr. Stefani violated his duty under MRPC 3.4(c), and that he did so knowingly. *Misconduct Report of Tri-County Hearing Panel No. 26 at 25*. The ABA Standards classify this misconduct as an abuse of the legal process. ABA Standard 6.2.

The panel must now determine the extent of the actual or potential injury to the legal process caused by Mr. Stefani's misconduct. Petitioner argues emphatically that Mr. Stefani

caused actual injury because the City of Detroit incurred some \$600,000 in legal fees in connection with the lawsuit the *Detroit Free Press* brought against it under the Freedom of Information Act (FOIA Litigation). Under Petitioner's "but for" reasoning, there would have been no need for the FOIA Litigation if Mr. Stefani had given the text messages to Judge Callahan, filed his supplemental brief containing references to the text messages, or refused Mr. McCargo's suggestion that they redraft the settlement documents. *Petitioner's Memorandum of Law Re: Sanctions*, at 2. But for Mr. Stefani's failure to reveal the text messages, according to Petitioner, the *Free Press* would not have had to seek court intervention to obtain them, and the City would not have had to incur the costs of defense in the FOIA litigation.

The evidence does not support Petitioner's argument and its attempt to connect Mr. Stefani's misconduct in the Brown/Nelthrope case with the City of Detroit's legal bills for its defense of the FOIA Litigation is untenable. First, the suppression of the text messages prior to the FOIA Litigation was not the result of Mr. Stefani's single-handed efforts, but the result of intense negotiations among all of the attorneys involved in the settlement of the Brown/Nelthrope case. It strains logic to place the entire blame on him. In addition, the evidence showed that Mr. Stefani's role in the FOIA Litigation was in reality quite peripheral: he was not an attorney of record and his only appearance in the case was as a fact witness. Krystal Crittendon, Corporation Counsel for the City, testified at the sanctions hearing in this matter that Mr. Stefani played no active role as an attorney in the litigation with the Free Press. (Tr. at 15, 4/1/10). Accordingly, the panel finds that Mr. Stefani's misconduct did not cause actual injury to the legal process.

However, the panel finds that his misconduct did create the potential for harm, even though no actual injury occurred. We reject Mr. Stefani's attempt to minimize the impact of his

misconduct on the legal process using a “no harm, no foul” rationale. Mr. Stefani’s admitted failure to serve opposing counsel with a copy of the subpoenas for the text messages and failure to submit the text messages to the Court for review created a palpable risk that text messages that may have contained privileged or other confidential material may have been released to the general public without first being redacted. Our conclusion is not altered by the fact that, according to the hearing testimony of both Judge Callahan and Sam McCargo, the text messages likely would have gone to the jury in any event and become part of the public record of the trial. That testimony does not diminish the fact that Mr. Stefani’s misconduct created the *potential* for injury to the legal process *at the time he committed the misconduct*. (Tr. 11-12, 12/4/09; Tr. 51-52, 11/18/09). If we were to adopt Mr. Stefani’s rationale in this regard it would provide little or no incentive to future attorneys to observe their duties under the Michigan Rules of Professional Conduct and the Michigan Court Rules. Accordingly, we find that Mr. Stefani’s misconduct created the potential for injury to the legal process.

2. Determination of the ABA Recommended Sanction.

The ABA Standards provide that “absent aggravating or mitigating circumstances, upon application of the factors set out in Standard 3.0 the following sanctions are generally appropriate in cases...(involving) failure to obey any obligation under the rules of a tribunal...” *ABA Standards For Imposing Lawyer Sanctions, Standard 6.2*. ABA Standard 6.22 provides that “(s)uspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.” Due to Mr. Stefani’s admitted violation of a Court rule, the panel’s finding that he knowingly disregarded Judge Callahan’s

order, and the fact that his misconduct created potential injury, the panel has concluded that the applicable ABA Recommended sanction is suspension.

3. Relevant Aggravating and Mitigating Factors.

Petitioner characterizes Mr. Stefani's failure to disclose to defense counsel his service of the subpoenas as a retaliatory or vengeful act that we should consider as an aggravating factor within the meaning of ABA Standard 9.22 (b). Aggravation or aggravating circumstances are defined as "...any considerations or factors that may justify an increase in the degree of discipline to be imposed." *ABA Standard 9.21*. After reviewing the authorities cited in *Petitioner's Memorandum of Law Re: Sanctions*, we have concluded that Mr. Stefani's failure to disclose the subpoenas certainly constituted misconduct, but did not rise to the level of an aggravating factor. The cases cited by Petitioner are distinguishable on their facts: *In Re Lackey*, 333 Or 215 (2002) (court imposed a one year suspension for a former judge advocate who disclosed client confidences and secrets to the press out of a desire to embarrass or injure the officers of the Oregon National Guard); *GA v Krupp*, Case No 96-287-GA (ADB 2002) (affirming the imposition of a 90-day suspension after attorney affirmatively misrepresented to the court and opposing counsel that his client's psychiatrist had written a letter in support of his client's fitness for custody of her children, when in fact he knew that his client had written it); and *People v Putler*, 35 P 3d 571 (2001) (imposing a three month suspension after deputy district attorney knowingly and intentionally represented to an at large murder suspect that he was a public defender who would assist the suspect in his effort to surrender).

Furthermore, we disagree with the Petitioner's assertion that Mr. Stefani refused to acknowledge the wrongful nature of his conduct. Mr. Stefani admitted that he did not use good judgment. (Tr at 79, 10/8/09). Finally, the panel declines to adopt Petitioner's position that Mr.

Stefani's long career and his service as a volunteer panelist for the Attorney Discipline Board constitute aggravating factors. As discussed below, we consider the fact that Mr. Stefani has practiced law for over 40 years without any disciplinary record to be a mitigating, not aggravating, factor in this analysis.

Several mitigating factors are relevant to our continued analysis. Mr. Stefani has had no record of professional misconduct or discipline during the 41 years he has been licensed to practice law in this State, and the misconduct under review by this panel appears to have been an aberration unlikely to be repeated. There also was no evidence that Mr. Stefani was motivated by a dishonest pecuniary motive in settling the Brown/Nelthrope and Harris cases. In fact, the evidence showed that he accepted a reduced attorney fee as part of the settlement of the Brown/Nelthrope and Harris cases. Mr. Stefani testified that although it was highly likely that his clients would prevail on appeal and ultimately receive some \$10 to 12 million (with a potential for attorney fees on appeal for Mr. Stefani), his clients were strongly in favor of receiving less if it meant that the litigation would end then. (Tr. 83-84, 11/12/09). The evidence established that the parties agreed to settle both the Brown/Nelthrope case, as well as a case between Walter Harris and the City of Detroit, for a total of \$8 million. As part of the settlement, Mr. Stefani withdrew his request for statutory attorney fees under the Whistleblower's Protection Act, which he had calculated as being some \$ 958,000. *Petitioner's Exhibits 8, 12, 15*). Rather than revealing a dishonest financial motive, we believe Mr. Stefani's conduct in this regard indicated instead that he was focused on his clients' best interests and express wishes in pursuing a settlement of their cases.

Furthermore, Mr. Stefani demonstrated a cooperative attitude throughout these proceedings. In addition, the panel heard testimony from nine witnesses who spoke of his character and integrity throughout his long career. (Tr. 61-85, 11/18/09).

D. DISCIPLINE.

Accordingly, the panel declines to impose the ABA Recommended Sanction of suspension. In light of the foregoing mitigating factors, we impose the sanction of reprimand¹ without conditions. *MCR 9.106(3)*. We are confident that this very public discipline serves the basic goal of the disciplinary system announced by the Michigan Supreme Court: to protect “the public, the courts and the legal profession”² because it openly and permanently memorializes Mr. Stefani’s wrongdoing. In light of the nature of his misconduct, we conclude that a reprimand sufficiently addresses the issues raised by that misconduct and we do not think that suspending Mr. Stefani’s right to practice law on this record would advance the basic goal of the disciplinary system in Michigan.

IV. PRIOR DISCIPLINE

None

¹ The ABA Standards provide that a “reprimand, also known as a censure or public censure, is a form of public discipline which declares the conduct of the lawyer improper, but does not limit the lawyer’s right to practice.” *ABA Standard 2.5*.

² *Grievance Administrator v Lopatin*, 462 Mich 235, 244 (2000); MCR 9.105.

V. ITEMIZATION OF COST

Attorney Grievance Commission:	
(See Itemized Statement filed 04/30/10)	\$ 602.42
Attorney Discipline Board:	
Hearing held 09/15/09	\$ 155.00
Hearing held 10/08/09	\$ 624.50
Hearing held 10/26/09	\$ 209.50
Hearing held 11/12/09	\$ 950.50
Hearing held 11/18/09	\$ 416.50
Hearing held 12/04/09	\$ 393.50
Conference Call 02/08/10	\$ 4.92
Hearing held 04/01/10	\$ 259.00
Hearing held 04/30/10	\$ 602.42
Administrative Fee [MCR 9.128(B)(1)]	<u>\$1,500.00</u>
TOTAL:	\$5,115.84

TRI-COUNTY HEARING PANEL NO. 26

Anne Widlak
Anne Widlak, Chairperson

James E. Baiers (by Aw with permission)
James E. Baiers, Member

Barry Goldman (by Aw with permission)
Barry Goldman, Member

Dated: June 23, 2010